Supreme Court, U.S.
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No. 96 87

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

EDWARD DONALD MOODY,
Petitioner,

v.

DEPARTMENT OF EDUCATION OF THE STATE OF ALABAMA; DR. WAYNE TEAGUE, in his official capacity as State Superintendent of Education; THE PERSONNEL DEPARTMENT OF THE STATE OF ALABAMA; and DR. HALYCON V. BALLARD, in her official capacity as Director of State Personnel,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether changing an employment promotional policy to emphasize subjective criteria rather than specific professional experience, inevitably resulting in a marked disadvantage to older employees, is violative of the Age Discrimination Employment Act?
2. Whether the established pattern and practice of routinely promoting the youngest person available is relevant to the trial court's determination of the existence of age based discrimination?
3. Whether an arbitrary quasi-legislative state administrative policy-making decision is violative of principles of substantive due process?
4. Whether age related classifications which arbitrarily and adversely impact older persons are violative of the Equal Protection Clause?

PARTIES, PARENT COMPANIES AND SUBSIDIARIES

In compliance with Supreme Court Rule 14(b) Petitioner represents to this Honorable Court that the parties to this petition are all named in the caption of this case. To the knowledge of the Petitioner, there are no parent companies or non-wholly owned subsidiaries with an interest in the case.

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REFERENCE TO REPORTS OF OPINIONS

The unpublished decision of the United States Court of Appeals for the Eleventh Circuit was entered on January 29, 1996 (App. 1a) and the order denying rehearing and rehearing en banc was entered on April 17, 1996 (App. 22a). The unpublished decision of the United States Dis-

trict Court for the M.D. of Alabama was entered on March 13, 1995 (App. 6a).

CONCISE STATEMENT OF GROUNDS FOR JURISDICTION

The judgment or order of the United States Court of Appeals for the Eleventh Circuit being reviewed is dated January 29, 1996 and rehearing en banc on April 17, 1996.

The statutory provision conferring jurisdiction upon this court to review the judgment or decree in question by Writ of Certiorari is 28 U.S.C. § 1254(1). Rule 10 of the Supreme Court Rules provides for review of a court of appeals decision when the decision has (a) "so far departed from the accepted and usual cause of judicial proceedings, or sanctioned such a departure by a lower court, as to call for this Court's power of supervision," or when the court of appeals (b) "has decided an important question of federal law which has not been, but should be, settled by this court, or has decided a federal question in a way that conflict with applicable decisions of this court.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below.

The Plaintiff, Edward Donald Moody, filed his initial complaint in this case on April 23, 1993, alleging that he was 60 years of age and had been discriminated against in his employment because of his age. (R1-1). The complaint was filed against his employer, the Department of Education of the State of Alabama, and it sought relief based upon the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, as well as under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634. The complaint was subsequently amended to add as a Defendant Dr. Wayne Teague, in his official capacity as State Superintendent of Education, (R1-25),

and was again amended to add the Personnel Department of the State of Alabama and also Dr. Halycon V. Ballard, as Director, State Personnel, as Defendants. (R2-36).

The Defendants all filed Answers to the Complaint. (R1-4; R1-31; R2-40; R2-41). Additionally, all Defendants submitted motions for summary judgment (R1-9; R2-48) and briefs and materials in support thereof. (R1-10; R1-28; R1-32; R2-49; R2-56). The Plaintiff filed his responsive material under Rule 56, Fed. R. Civ. P. (R1-13; R1-14; R1-34; R2-58; R3-59; R3-60; R3-61; R3-62; R3-67).

The trial court granted summary judgment in favor of all Defendants on March 13, 1995 (R3-69), which judgment was supported by a contemporaneous memorandum opinion. (R3-68). The Plaintiff filed a timely motion to alter or amend the judgment (R3-70), which was denied by the trial court on April 19, 1995. (R3-70).

Moody perfected an appeal to the Eleventh Circuit Court of Appeals. Following briefing of the issues, the court entered a per curiam opinion on January 29, 1996 affirming the trial court. Subsequently, on April 17, 1996, the Eleventh Circuit denied Moody's Petition for Rehearing/Suggestion on Hearing En Banc.

B. Statement of the Facts.[1]

The Plaintiff, Edward Donald Moody, is presently 63 years of age. He was hired by the Alabama Department of Education on January 10, 1996. At that time, Moody held the position of Rehabilitation Counselor II. Moody

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[1] This statement of the facts will constitute a virtual verbatim repetition of the trial court's recitation of them in its memorandum opinion at Volume 3, document 68, pages 2 to 7, with the trial court's footnotes merged into the body of the statement. Where there is a diversion from the trial court's recitation, the proper references will be made to the record or to other authority where the material referred to may be found).

remained in that position until he resigned from the Department of Education on November 13, 1967.

On November 11, 1971, Moody returned to the Department and resumed his former duties as a Rehabilitation Counselor II. Moody was promoted to the position of Rehabilitation Counselor III on October 11, 1972, and to the position of Rehabilitation Supervisor I on May 7, 1975. The title of this position was subsequently changed to Disability Determination Supervisor I. On December 27, 1978, Moody was promoted to his present position as a Disability Determination Supervisor II. Despite having submitted several applications since that time for the position of Disability Determination Supervisor III, Moody has not been promoted to a higher supervisory level. Moody's most recent application, which he submitted in response to an August 19, 1992 job announcement, is the main focus of this lawsuit. Moody contends that this application was rejected because the defendants were biased against older employees. Moreover he argues that the defendants' biases permeated the procedures established for hiring and promoting employees.

Traditionally, when a state agency wishes to hire or promote persons for a particular job classification, the agency will notify the State Personnel Department, which in turn will publish a promotional examination announcement. Persons responding to a particular announcement are required to submit their applications directly to the Personnel Department. All of the applications are then set aside for grading. Based on these grades, the Personnel Department will select a certain number of applicants for a "register of eligible." The register is a list of those persons who are deemed certified as eligible for promotion or hiring. Under state law, any person appearing on the list may be hired or promoted by the state agency's hiring authority. Section 36-26-17, Code of Alabama, (1975). While the trial court observed, at R3-68-3, "[t]here is no requirement that the person selected have

the highest grade ranking on the register" and that "[a]ll persons who are certified are deemed equally qualified," it is submitted that such statements are misleading. Persons on the "register of eligible" are in fact rated in the order of their qualifications. This ranking is of significant importance in this case. See *U.S. v. Frazer*, 317 F. Supp. 1079 (M.D. Ala. 1970).

As the foregoing suggests, the grade assigned to an applicant determines his or her ranking and whether he or she will appear on the register. An assigned grade is generally based on two criteria; an applicant's training and experience, and his or her service ratings over the preceding three years.

The training and experience component measures an applicant's time on the job and "relevant" work experience. The inquiry into the applicant's relevant experience keeps this portion of the grading from being a simple question of seniority. Job experience is relevant only up to a point, after which an applicant is considered to have "topped out." Thus, with many state job classifications it is possible for an applicant to have the same training and experience score as someone who is many years his senior. Prior to the Disability Determination Division's 1992 job announcement, the training and experience component accounted for 80% of the total grade while the three year service rating component accounted for 20% of the grade. Those percentages were changed in 1992 at the suggestion of an independent management review team commissioned by the Division to study its promotion policies. Thereafter, the Division requested that the applicants' training and experience scores constiture 60% of their total grade, and that their three year service rating score constitute 40% of their grade. The Personnel Department agreed to the change with the understanding that the new percentages would apply to all of the job classifications within the Division. The

new percentages were in effect during the 1992 Supervisor III promotions.

The service rating component is based on an average of the applicant's performance evaluations over a three year period. Evaluations are routinely made for all state employees. The evaluations are designed to quantify an employee's performance and ability in several different job-related areas. In 1990, the State Personnel Department made several changes to the Performance Evaluation System, which included changes in the Performance Appraisal forms used by employee supervisors. The Personnel Department required all supervisors, including Moody, to receive extensive training regarding the system. The new system was in place during part of the three year period leading up to the 1992 Supervisor III job opening.

Prior to his 1992 application for the position of Disability Determination Supervisor III, Moody submitted applications for the same position on three different occasions. In each instance, Moody was among the number of applicants who were certified as eligible for promotion.

In 1984, Moody submitted an application for the position of Disability Determination Supervisor III to the State Personnel Certificate of Eligible. Moody was ranked number three out of four based on the grade assigned to him. The persons ranked number two (Ann Anderson) and four (William Smith) were selected by the Department of Education's Disability Determination Division.

In 1986, Moody submitted an application for the same position to the Personnel Department and again he was included on the Certificate of Eligible. In this instance, Moody was ranked number two out of four persons listed on the Certificate of Eligible. The person ranged number four (Jack Miller) was selected for the position by the Department of Education's Disability Determination Division.

In 1989, Moody submitted another application to the Personnel Department and again his name was among those included on the Certificate of Eligible. Moody was ranked number one out of five. The persons ranked number four (Wanda Thomas) and five (Stephen Scruggs) were promoted to the position of Disability Determination Supervisor III.

In response to an August 19, 1992 promotion announcement, Moody submitted the application referred to in his complaint. On November 3, 1992, the State Personnel Department certified a list of eight persons eligible for promotion to the two positions. Moody was included in that list and was ranked seventh out of eight persons. Again, the Division did not select him for either of the positions. The persons selected were James Methvin, who was ranked number one, and Steven Stewart, who was ranked number four. Methvin was 41 years old at the time of his promotion and had been employed with the Department since 1974. Stewart was 43 years old at the time of his promotion and had been employed with the Department since 1973.

At the time of the promotion of Methvin and Stewart over Moody, all three were serving as Supervisors II. Moody had 17 years of supervisory experience, 13½ years of which were as a Supervisor II. Methvin had only 6 years of total supervisory experience, with only 3 of those years as a Supervisor II, and Stewart had a total of 9 years of supervisory experience, with only 2 of those years being served as a Supervisor II. (R1-13-3; R1-14 A5 [in separate binder]). Since no experience beyond the "top out" period of two years was considered, each of those three candidates received the same score for "training and experience". (R1-13-5).

Moody alleges that he was denied a promotion to the position of Disability Determination Supervisor III because the promotion system developed by the Personnel

Department and implemented by his own Division of the Education Department discriminated against applicants based on their age. Specifically, Moody argues that the following factors created this allegedly biased system:

1. That the new performance evaluation system put in place by the State Personnel Department in 1990 was less objective than the previous system, and that this lack of objectivity caused him to receive lower evaluation scores in some instances.

2. That the Disability Determination Division decided pursuant to an independent management review team recommendation to change the weight of an applicant's experience and training score from 80% of his or her overall grade to 60%.

3. That an applicant's experience and training score can "top out" after a certain number of years in the same position.

Moody asserts that the defendants' failure to promote him violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment and the Age Discrimination in Employment Act of 1967. The Defendants have responded to these charges by stating that Moody cannot make out a prima facie case of age discrimination under any legal theory. Furthermore, the defendants assert that even if Moody has made out a prima facie case, he has failed to put forth any evidence proving that the defendants' proffered reasons for the employment actions are pretextural.

As will hereinafter be explained in the argument, the net results of events since 1984 has been that younger persons have consistently and without exception been promoted instead of older applicants.

REASONS FOR GRANTING THE PETITION

I. THE 1992 COMPETITION.

The district court's memorandum opinion at R3-68-8 through 14, assesses the Plaintiff's case under the disparate treatment tests laid down in *McDonald Douglas Corp. v. Green*, 411 U.S. 992 (1973). It concluded that Moody had met the *prima facie* standards of *McDonald Douglas* by proving that he was a member of a protected group, that he had been subjected to adverse employment treatment, that substantially younger applicants were promoted in his stead, and that he was qualified for the promotion.

The trial court noted, however, that since the Personnel Department and its Director did not participate in the actual selection of candidates, that it had not subjected Moody to adverse treatment, and that Moody had therefore not established a *prima facie* case against those Defendants. That decision totally overlooks the fact that the Personnel Department Defendants set the mechanism in motion by establishing standards that permitted Moody's younger competitors to outscore him on the qualifying material.

The trial court also ignored the principle, argued by the Plaintiff at R1-13-9, that the de-emphasis upon experience and the "topping out" of credit therefore constituted an adverse disparate impact upon older persons as a class. Disparate impact claims involve employment practices that are facially neutral but that subject the protected group to more stringent treatment that cannot be justified by business necessity. *Hazen Paper Company v. Biggins*, 507 U.S. ——, 123 L.Ed. 2d 338, 113 S.Ct. 1701 (1993). Proof of discriminatory motive is not required under a disparate impact theory. *Teamsters v. United States*, 431 U.S. 324 (1977). Even if the practice of de-emphasizing could be shown to serve a legitimate business purpose, Moody should still prevail if an alternative practice exists without producing an adverse impact on

the protected group. See *MacPherson v. University of Montevallo,* 922 F.2d 766, 771 (11th Cir. 1991).

The trial court clearly erred when it held that a *prima facie* case against the Personnel Department Defendants had not been established, and further erred when it failed to examine the facts in this case in the light of the disparate impact theory.

In its memorandum opinion, at R3-68-13, 14, the trial court reviewed the Defendants' purported legitimate non-discriminatory reasons for their non-promotion of Moody. As to the change in performance evaluations to a more subjective system, the Defendants' assert that all of that responsibility lies with the Personnel Department officials, and that Moody's lesser scores were caused by his own lack of performance. However, two of Moody's rating supervisors could not identify any reason for the drop in Moody's performance evaluations except for the change in the rating procedure. (R1-14-E12, 13; R1-14-F24 through 27). Another anomaly that existed was that Moody's ratings were reduced only for the years used to evaluate the 1992 applicants for the position of Disability Determination Supervisor III, and reverted back up to a higher level the following year. (R1-14-A5, 6).

The trial court also observed that the Defendants attempted to explain the de-emphasis upon the experience factor by pointing out that a system rewarding experience would stifle the advancement of otherwise "qualified minority applicants." (R3-68-14). The court also noted the Defendants claim that the de-emphasis did not harm Moody, because he received the same experience score as all of the other applicants since all scores were "topped out" at a certain level. "Topping out" was deemed appropriate because "every additional year in the same position does not produce an equivalent increase in productivity." (R3-68-14). These responses, when applied to Moody, are arbitrarily circuitous. He was the candidate

with the most experience, but he is told that he should not complain because he gets the same score as younger, less experienced workers. He is then also told that experience does not count after an arbitrary time limit is placed upon it as a factor. Those reasons themselves demonstrate that they are posited upon a pretext. At the very least, the evidence is due to be submitted to the trier of facts, because the proffered "legitimate, nondiscriminatory" reasons are all aimed at removing the older and more experienced supervisory employee's competitive edge over younger applicants.

II. THE PATTERN OF DISCRIMINATION.

The trial court's memorandum opinion recites that a *prima facie* case of age discrimination may be established "by statistical proof of a pattern of discrimination." (R3-68-9 [quoting from *Verbraceken v. Westinghouse Electric Corp.*, 881 F.2d 1041, 1045 (11th Cir. 1989]).

It has been pointed out in this case that, for the ten year period covering 1985 to 1994, no one over the age of 50 within the supervisory ranks of the Disability Determinations Division of the [Education] Department ("DDD") was promoted to a higher position. (R1-14-A2).

In 1984, there were four persons on the register for promotion to DDD Supervisor III, and Moody was ranked number three. The person ranked number two (Ann Anderson) and four (William Smith) were selected (R3-68-6). Ms. Anderson, age 65, and Mr. Smith, age 54, were the oldest persons on that register. (R3-61-4). From that point forward, all persons promoted to DDD Supervisor III have been the youngest reachable candidates. In 1986 and 1989, the appointing authorities found it necessary to pass over all persons on the list who were older in order to reach the youngest candidate. In 1986, when Jack Miller was promoted, he was 36 years of age

and was ranked number 4 (R3-68-5). In order to appoint him, it was necessary to pass over number one-ranked William R. Myers, who was 54 years of age, number two-ranked Moody, who was 53 years of age and number three ranked Evelyn C. Woolsey, who was 62 years of age. (R3-61-4).

In 1989, Wanda E. Thomas was ranked number 4 and was 48 years of age, and number five ranked Steven S. Scruggs was 40 years of age. They were both promoted over Moody, who was ranked number 1 and was 56 years years of age, and Olin K. Anthony, who was ranked third and who was 57 years of age. (R3-68-5; R3-61-4).[2]

After the de-emphasis on experience occurred, the 1992 register reflected that the youngest applicant on the register, James R. Melthvin, placed number one. He was 41 years of age at the time. The other person promoted, Steven R. Stewart, was 43 years of age and was the second youngest person on the list. (R3-61-4). The older persons on the list were ranked as number five, seven, and eight.

The available statistics clearly reveal that all promotions to DDD Supervisor III since 1984 have gone to the youngest possible candidates. With the previous system of giving full credit for experience, it was necessary to pass over more qualified older people to get to the younger applicants. The obvious conclusion reached was that such a practice would be challenged as unlawful if it continued, and that some alternate system would be required to improve the standing of the younger applicants. That result was accomplished by the de-emphasis

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[2] The U.S. Supreme Court has recently held that an individual in the protected class of those over 40 years of age may be discriminated against where the favorable treatment goes to a younger individual despite said younger individual's age also being in excess of 40. *O'Conner v. Consolidated Coin Caterers Corp.*, 517 U.S. —— (1996), 134 L.Ed.2d 433.

upon experience and the insertion of more subjective criteria which could be tailored to provide the desired result without the blatant violation of statutory and constitutional provisions.

III. SUBSTANTIVE DUE PROCESS.

At R3-68-15 and 16, the trial court relied upon the case of *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994) (en banc), to hold that there can be no substantive due process violation in the employment context. The trial court also noted that the Due Process Clause did not apply because Moody had claimed no property right in his desire to be promoted. (R3-68-16).

The Plaintiff contends that he does have a property right to protect in this case. That property right involves the right to compete for a high numerical position on the list of eligible; the best qualified person has a right to the number one ranking position on the list of eligible. The United States Supreme Court held in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982) that "[a] claimant has more than an abstract desire or interest in redressing his grievance; his right to redress is guaranteed by the State, with the adequacy of his claim assessed under what is, in essence, a 'for cause' standard, based upon the substantiality of evidence." *Logan* set a precedent for protecting the property rights of intangible property, such as the right to certain basic minimum procedural requirements. *Id.*

The Plaintiff contends that his right to seek a high ranking on the register and the corresponding right to equal access to that place (equal to the other competitors) has been violated by the Personnel and Education Defendants. Both the Personnel and Education Defendants have determined that only a certain number of years' supervisory experience is "relevant experience." The action of capping those years and refusing to consider the

totality of a candidate's years of experience is one violation of which the Plaintiff complains. Further, the Defendants have diminished the overall importance of experience in the promotion process by reducing the percentage weight for expereince from 80% to 60% while increasing the percentage weight assigned to the far more subjective factor of performance ratings by one's supervisor's. The Plaintiff loses the benefit of a wealth of valuable experience, which is indubitably one of the primary and essential assets which any candidate for any hiring or promotion (except this particular promotion) fundamentally needs to secure that promotion. Typically, employers acknowledge the desirability of obtaining experienced employees; the more experienced the worker, the more valuable. It is the Defendants' legislative act in discounting years of experience that violates the Plaintiff's due process rights, by capping total years experience off after an *arbitrarily designated* point and by decreasing the overall value assigned to that attribute. The Plaintiff asserts that the right to placement on the register and, more precisely, to be placed at his rightfully earned numerical rank, is the entitlement which has been wrongly blocked by the Defendants' actions. The well recognized case of *U.S. v. Frazer*, 317 F. Supp. 1079 (M.D. Ala. 1970), fully supports the premise that the appropriate register ranking is protected by the Fourteenth Amendment's Due Process Clause.

In *McKinney*, the Eleventh Circuit makes two critical distinctions. The first is between substantive and procedural due process. The Plaintiff has made no procedural due process claims in this case, so that portion of *McKinney* dealing with procedural due process need not be discussed. The substantive component of the due process clause bars certain arbitrary and wrongful government actions "regardless of the fairness of the procedures used to implement them." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). The Plaintiff's due process

claims are substantive in nature. Whether *McKinney* applies to substantive due process depends upon whether the violation alleged by a plaintiff was the result of a legislative act or an executive act. The Eleventh Circuit in that case cautions that "we hold that, *in non-legislative cases,* only procedural due process claims are available to pretextually terminated employees." 20 F.3d at 1560 (emphasis added). The Plaintiff submits that the due process violations he alleged in this case are the result of legislative acts, and therefore, the decision in *McKinney* is inapplicable to his case.

The Defendants below attempted to limit non-legislative acts to the executive branch of government and legislative acts to "legislative bodies using legislative procedures." (R1-32-2). Although such characterizations may be the general rule, they are not exclusive. As the Eleventh Circuit states in *McKinney*: "Executive acts *characteristically* apply to a limited number of persons (and often to only one person); executive acts *typically* arise from the ministerial or administrative activities of members of the executive branch." *Id.* at 1557 n.9 (emphasis added). The most common example of an executive act case is an employment termination. See *Board of Regents v. Roth,* 408 U.S. 564 (1972) distinguishing legislative acts, the Court then stated: "Legislative acts, on the other hand, *generally* apply to a larger segment of—if not all of—society; laws and broad-ranging *executive regulations* are the most common examples." 20 F.3d at 1557 n.9 (emphasis added). The Court discussed *Harrah Ind. School Dist. v. Martin,* 440 U.S. 194 (1979), in which the school board instituted a new, prospective rule under which the renewal of the contract of any teacher who refused to take continuing education courses was precluded. Ms. Martin refused to take the courses, the school board refused to renew her contract, and Mr. Martin sued on the basis of a substantive due process violation. *McKinney* explained that "[e]ven though the School Board had

applied its rule only to Martin, the Supreme Court examined the case as one involving a legislative act; hence, the Court analyzed the rule itself, not the School Board's application of the rule to Martin." 20 F.3d at 1557 n.9.

It is clear, then, that the promulgation of executive regulations and rules are indeed considered legislative in nature, even though they were not the acts of a traditional legislative body. It is also clear that the application of those rules and regulations to even a single person can be challenged on the basis of substantive due process because the challenge is to the rule or regulation itself, not its application to the person.

The issue of a substantive due process right within an employment context, as addressed in *McKinney,* is of such importance as to invite a visit to this issue, by the Court.

It is respectfully submitted that the *McKinney* holding constitutes no barrier to Moody's due process claim in this case.

IV. EQUAL PROTECTION OF THE LAW.

The trial court has held that no equal protection claim can survive in this case. In so doing, however, the trial court seems to concede that an age-based classification can be made the basis of an equal protection claim, citing *Vance v. Bradley,* 440 U.S. 93, 97 (1979). If, indeed, these Defendants set out to deliberately deprive older persons of established rights by depriving them of the fruits of their lengthy experience, that effort would not only be irrational, but could also qualify as being callous.

CONCLUSION

For all of the foregoing reasons, the Appellant Moody respectfully requests that this Honorable Court grant a petition for a Writ of Ceriorari to the Eleventh Circuit Court of Appeals, reverse the decision of the trial court, and remand this cause to that court for the trial of the issues.

Respectfully submitted,

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Dated: July 16, 1996

APPENDIX A

[Filed Jan. 29, 1996]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-6395

Non-Argument Calendar

D. C. Docket No. CV-93-D-529-N

EDWARD DONALD MOODY,
Plaintiff-Appellant,

versus

THE DEPARTMENT OF EDUCATION OF THE STATE OF ALABAMA; PERSONELL DEPARTMENT OF THE STATE OF ALABAMA; HALYCON V. BALLARD, DR., in her official capacity as Director of State Personnel; WAYNE TEAGUE, DR., in his official capacity as State Superintendent of Education,
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Alabama

January 29, 1966

Before ANDERSON, BIRCH and BLACK, Circuit Judges.

PER CURIAM:

Plaintiff, Edward Donald Moody, appeals the district court's grant of summary judgment in favor of all defendants. We affirm.

Moody is employed by the Disability Determination Division of the Alabama Department of Education (Edu-

cation) as a Disability Determination Supervisor II. He has applied several times for the position of Disability Determination Supervisor III, but despite being placed on the list of qualified candidates every time, he has not been selected for promotion. Moody alleges that the selection process used to create the 1992 list of qualified candidates discriminated against older employees.

When a state agency wants to hire or promote individuals into a particular job classification, the agency notifies the state Personnel Department (Personnel). Personnel publishes a promotional examination announcement. Anyone wishing to respond to the announcement files an application directly with Personnel. The applications are graded by Personnel, which then prepares a list of eligible candidates. Although the candidates are placed on the list in order by grade, everyone on the list is certified as eligible for promotion or hiring, and all are deemed equally qualified. Any person on the list may be hired or promoted by the agency's hiring authority without regard to position on the list. Ala. Code § 36-26-17.

In grading candidates for promotions to supervisory positions within the Disability Determination Division, Personnel considers two components: (1) training and "relevant work experience" and (2) service ratings during the preceding three years. Not all job experience is "relevant work experience" so an applicant's experience score will "top out" after a certain number of years. Thus, grading of training and experience is not simply a matter of seniority.

In response to the 1992 promotion announcement, Moody submitted his application. He was included on the list of certified candidates and was ranked seventh out of eight. The candidates ranked first and fourth were selected for the available positions.

Moody filed this suit alleging violations of the Age Discrimination in Employment Act of 1967 and the Due Process and Equal Protection Clauses of the Constitution.

The district court granted summary judgment in favor of all defendants. Moody filed this appeal. We affirm on the basis of the well-reasoned district court order.

Although Moody is correct in suggesting that the district court did not address his disparate impact claim, the district court did not need to do so. The only specific practice which Moody alleged disparately impacted older employees was the practice of "topping out" experience. Moody admitted that the decision to use this practice was made by Personnel and not by Education. Moody has, therefore, not made a disparate impact claim against Education. The district court found that Moody had failed to establish a prima facie case of discrimination against Personnel because Moody failed to show that Personnel took any adverse action against him. As the district court correctly found, Personnel's "actions with respect to Moody's applications were entirely favorable" because Moody's name was included on the list of eligible candidates and every candidate on the list was equally qualified for the position. Personnel had no influence on the final selection of candidates from the list. Thus, even if the practice of "topping out" experience adversely impacted older employees, and Moody has not provided evidence to show that it did, it did not adversely impact Personnel's actions with respect to Moody.

AFFIRMED.

[Filed Jan. 29, 1996]

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-6395

Non-Argument Calendar

D. C. Docket No. CV-93-D-529-N

EDWARD DONALD MOODY,
Plaintiff-Appellant,

versus

THE DEPARTMENT OF EDUCATION OF THE STATE OF ALABAMA; PERSONNEL DEPARTMENT OF THE STATE OF ALABAMA; HALYCON V. BALLARD, DR., in her official capacity as Director of State Personnel; WAYNE TEAGUE, DR., in his official capacity as State Superintendent of Education,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Alabama

Before ANDERSON, BIRCH and BLACK, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

It is further ordered that plaintiff-appellant pay defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

Entered: January 29, 1996

For the Court:

MIGUEL J. CORTEZ
Clerk

By: /s/ Matt Davidson
Deputy Clerk

Issued as Mandate: 5/1/96

APPENDIX B

[Filed Mar. 13, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action 93-D-529-N

EDWARD DONALD MOODY,

Plaintiff,

vs.

THE DEPARTMENT OF EDUCATION OF THE STATE OF ALABAMA; DR. WAYNE TEAGUE, in his official capacity as State Superintendent of Education; THE PERSONNEL DEPARTMENT OF THE STATE OF ALABAMA; and DR. HALCYON V. BALLARD, in her official capacity as Director of State Personnel,

Defendant(s).

MEMORANDUM OPINION

This matter is now before the court on the defendant the Department of Education's motion for summary judgment, filed March 3, 1994, and on the defendant the Personnel Department's motion for summary judgment, filed February 14, 1995. The plaintiff, Edward Donald Moody, responded to the Department of Education's motion for summary judgment on March 28, 1994, and to the Personnel Department's motion for summary judgment on March 3, 1995. For the reasons set forth below, the motions are due to be granted

Jurisdiction

The court has jurisdiction over this matter pursuant to 28 U.S.C. Sections 1331 and 1343, as the plaintiff's claims arise under 42 U.S.C. Section 1983, the Due Process and Equal Protection Clauses of the Fourteenth

Amendment to United States Constitution, and 29 U.S.C. Sections 621-634, the Age Discrimination in Employment Act of 1967.

Factual Background

The plaintiff, Edward Donald Moody, is presently 61 years of age. He was hired by the Alabama Department of Education on January 10, 1966. At that time, Moody held the position of Rehabilitation Counselor II. Moody remained in that position until he resigned from the Department of Education on November 13, 1967.

On November 11, 1971, Moody returned to the Department and resumed his former duties as a Rehabilitation Counselor II. Moody was promoted to the position of Rehabilitation Counselor III on October 11, 1972, and to the position of Rehabilitation Supervisor I [1] on May 7, 1975. On December 27, 1978, Moody was promoted to his present position as a Disability Determination Supervisor II. Despite having submitted several applications since that time for the position of Disability Determination Supervisor III, Moody has not been promoted to a higher supervisory level. Moody's most recent application, which he submitted in response to an August 19, 1992 job announcement, is the main focus of this lawsuit. Moody contends that this application was rejected because the defendants were biased against older employees. Moreover he argues that the defendants' biases permeated the procedures established for hiring and promoting employees.

Traditionally, when a state agency wishes to hire or promote persons for a particular job classification, the agency will notify the State Personnel Department, which in turn will publish a promotional examination announcement. Persons responding to a particular announcement are required to submit their applications directly to the

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[1] The title of this position was subsequently changed to Disability Determination Supervisor I.

Personnel Department. All of the applications are then set aside for grading. Based on these grades, the Personnel Department will select a certain number of applicants for a "register of eligibles." The register is a list of those persons who are deemed certified as eligible for promotion or hiring. Under state law, any person appearing on the list may be hired or promoted by the state agency's hiring authority. Section 36-26-17, Code of Alabama, (1975).[2]

As the foregoing suggests, the grade assigned to an applicant determines his or her ranking and whether he or she will appear on the register. An assigned grade is generally based on two criteria; an applicant's training and experience, and his or her service ratings over the preceding three years.

The training and experience component measure an applicant's time on the job and "relevant" work experience. The inquiry into the applicant's relevant experience keeps this portion of the grading from being a simple question of seniority. Job experience is relevant only up to a point, after which an applicant is considered to have "topped out." Thus, with many state job classifications it is possible for an applicant to have the same training and experience score as someone who is several years his senior. Prior to the Disability Determination Division's 1992 job announcement, the training and experience component accounted for 80% of the total grade while the three year service rating component accounted for 20% of the grade. Those percentages were changed in 1992 at the suggestion of an independent management review team commissioned by the Division to study its promotion policies. Thereafter, the Division requested that the applicants' training and experience scores constitute 60% of their total grade, and that their three year service rating

[2] There is no requirement that the person selected have the highest grade ranking on the register. All persons who are certified are deemed equally qualified.

score constitute 40% of their grade. The Personnel Department agreed to the change with the understanding that the new percentages would apply to all of the job classifications within the Division. The new percentages were in effect during the 1992 Supervisor III promotions.

The service rating component is based on an average of the applicant's performance evaluations over a three year period. Evaluations are routinely made for all state employees. The evaluations are designed to quantify an employees' performance and ability in several different job-related areas. In 1990, the State Personnel Department made several changes to the Performance Evaluation System, which included changes in the Performance Appraisal forms used by employee supervisors. The Personnel Department required all supervisors, including Moody, to receive extensive training regarding the system. The new system was in place during part of the three year period leading up to the 1992 Supervisor III job opening.

Prior to his 1992 application for the position of Disability Determination Supervisor III, Moody submitted applications for the same position on three different occasions. In each instance, Moody was among the number of applicants who were certified as eligible for promotion.[3] However, he was not selected for any of the positions.

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[3] In 1984, Moody submitted an application for the position of Disability Determination Supervisor III to the State Personnel Department. The Personnel Department included his name on the Certificate of Eligibles. Moody was ranked number three out of four based on the grade assigned to him. The persons ranked number two (Ann Anderson) and four (William Smith) were selected by the Department of Education's Disability Determination Division.

In 1986, Moody submitted an application for the same position to the Personnel Department and again he was included on the Certificate of Eligibles. In this instance, Moody was ranked number two out of four persons listed on the Certificate of Eligibles. The person ranked number four (Jack Miller) was selected for

In response to an August 19, 1992 promotion announcement, Moody submitted the application referred to in his complaint. On November 3, 1992, the State Personnel Department certified a list of eight persons eligible for promotion to the two positions. Moody was included in that list and was ranked seventh out of eight persons. Again, the Division did not select him for either of the positions. The persons selected were James Methvin, who was ranked number one, and Steven Stewart, who was ranked number four. Methvin was 41 years old at the time of his promotion and had been employed with the Department of Education since 1974. Stewart was 43 years old at the time of his promotion and had been employed with the Department since 1973.

Moody alleges that he was denied a promotion to the position of Disability Determination Supervisor III because the promotion system developed by the Personnel Department and implemented by his own Division of the Education Department discriminated against applicants based on their age. Specifically, Moody argues that the following factors created this allegedly biased system:

1. That the new performance evaluation system put in place by the State Personnel Department in 1990 was less objective than the previous system, and that this lack of objectivity caused him to receive lower evaluation scores in some instances.

2. That the Disability Determination Division decided pursuant to an independent management review team

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the position by the Department of Education's Disability Determination Division.

In 1989, Moody submitted another application to the Personnel Department and again his name was among those included on the Certificate of Eligibles. Moody was ranked number one out of five. The persons ranked number four (Wanda Thomas) and five (Stephen Scruggs) were promoted to the position of Disability Determination Supervisor III.

recommendation to change the weight of an applicant's experience and training score from 80% of his or her overall grade to 60%.

3. That an applicant's experience and training score can "top out" after a certain number of years in the same position.

Moody asserts that the defendants' failure to promote him violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment and the Age Discrimination in Employment Act of 1967. The Defendants have responded to these charges by stating that Moody cannot make out a prima facie case of age discrimination under any legal theory. Furthermore, the defendants assert that even if Moody has made out a prima facie case, he has failed to put forth any evidence proving that the defendants' proffered reasons for the employment actions are pretextual.

SUMMARY JUDGMENT STANDARD

Summary judgment can be entered on a claim only if it is shown "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Supreme Court has stated:

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). In further elaboration on the summary judgment standard, the Court has said that "there is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986) (citations omitted). Summary judgment is improper "if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury return a verdict for the nonmoving party." *Id.* at 248. *See also Barfield v. Brierton*, 883 F.2d 923, 933 (11th Cir. 1989). The court is to construe the evidence and all factual inferences arising from it in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

DISCUSSION

I. The ADEA Claim

29 U.S.C. Section 623 provides, in part: "It shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age. . . ." 29 U.S.C. Section 623(a)(1).

In all cases arising under the ADEA, the plaintiff bears the initial burden of establishing a prima facie case of age discrimination. *Clark v. Coats & Clark, Inc.*, 990 F.2d 1217 (11th Cir. 1993); *Young v. General Foods Corp.*, 840 F.2d 825 (11th Cir. 1988). "If a plaintiff establishes a prima facie case . . . the employer must articulate a legitimate, nondiscriminatory rationale for the [decision not to promote]. If the employer does so, the burden shifts back to the plaintiff to prove that the employer's asserted reason is pretextual." *Young*, 840 F.2d at 828.

"There are three methods by which a plaintiff may establish a prima facie case of age discrimination: by direct evidence of discriminatory intent; by meeting the test originally set out for Title VII cases in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); or by statistical proof of a pattern of discrimination." *Verbraeken v. Westinghouse Electric Corp.,* 881 F.2d 1041, 1045 (11th Cir. 1989).

In this case, Moody has attempted to meet his initial burden of establishing a prima facie case of age discrimination by using circumstantial evidence in accordance with the test set forth in *McDonnel Douglas.* Under that test, a prima facie case is established when a plaintiff makes the following showing: (1) that plaintiff was a member of a protected group; (2) that plaintiff was subject to adverse employment action, e.g. failure to promote; (3) that a person outside the protected group was promoted instead; and (4) that plaintiff was qualified for the position. *Ramsey v. Chrysler First, Inc.,* 861 F.2d 1541, 1543 (11th Cir. 1988).

Under the first prong of the test, the plaintiff is required to prove that he is a member of a protected group. Here, the parties do not dispute that Moody is a member of a protected group for purposes of the ADEA. The protections of the ADEA clearly extend to those individuals who "are at least 40 years of age but less than 70 years of age." 29 U.S.C. Section 631(a). Moody's age of 60 satisfies the first element of the prima facie case.

The second prong of the test requires that Moody prove that he was subjected to adverse employment action. Moody offers his rejected promotion application as proof of this element. While that is certainly a sufficient allegation of adverse action as to the State Department of Education and its Superintendent, it is less clear that it alone will suffice as to the Personnel Department and its Director. It appears from this court's review of the record

that the Personnel Department's actions with respect to Moody's applications were entirely favorable. The Personnel Department included Moody's name in its register of eligibles every time he applied for a Supervisor III position. Moreover, it is undisputed that the Personnel Department had nothing to do with the final selection of persons named on the list it prepared. Essentially, all the Personnel Department did was to assign applicants grades in an objective manner based on facts and figures given to it by the Division of Disability Determination. Thus, the Personnel Department had no real opportunity under these limited circumstances to target Moody or anyone else for discriminatory treatment based on their age. While Moody has suggested that the Personnel Department subjected him to adverse treatment because of the new service evaluation system it developed, he has offered no proof that it was the system and not his own shortcomings on the job that caused him to receive lower performance scores on one or two occasions.[4] Therefore, because he has failed to show that he was subjected to adverse employment treatment by the State Personnel Department and its Director, Moody cannot make out a prima facie case under the ADEA against those defendants.

The third prong of Moody's prima facie case requires him to prove that applicants outside of the protected group were promoted in his stead. Here, the two persons promoted to the Supervisor III position were James Methvin, age 41, and Steven Stewart, age 43. At the time of their promotions, both men were themselves within the protected age group under the ADEA. However, that fact does not automatically cause Moody's case against the Department of Education and its Superintendent to fail.

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[4] Indeed, the materials submitted by the plaintiff indicate that he received exemplary performance scores from his Division in 1991 and 1993 under the Personnel Department's new appraisal system.

> "Unlike race and sex discrimination cases, the plaintiff in an age discrimination case need not necessarily prove that his replacement was outside the protected class, that is, under forty years of age. The plaintiff in an age discrimination case may establish a prima facie case merely by establishing that his replacement was younger than he, provided that the discrepancy between the ages, along with any other relevant evidence, is sufficient that a fact finder could reasonably infer age discrimination."

Corbin v. Southland Intern. Trucks, 25 F.3d 1545 (11th Cir. 1994).

In 1992, Methvin and Stewart were 19 and 17 years younger than Moody, respectively. However, there was little discrepancy between the applicants in the context of their time of employment with the Disability Determination Division and their time in supervisory level positions. Moody began his employment with the Division in 1971. By comparison, Methvin and Stewart started with the Division in 1973 and 1974 respectively. All three men were awarded the same score for their experience and training and Moody even admits in his deposition that his competitors were as qualified as he. As stated above, all of the persons included by the Personnel Department in their register of eligibles are considered qualified for the position they have applied for regardless of their numerical ranking. Nevertheless, Moody believes that his actual age was the deciding factor in the decision to promote other persons for the Supervisor III positions. While there is no direct evidence to support this contention, the age discrepancy does appear substantial enough to preclude a finding by this court that he has failed to meet his initial burden of making out a prima facie case under the ADEA.

As to the fourth prong of the *McDonnell Douglas* test, the parties all agree that Moody was among those persons deemed qualified for the position of Supervisor III.

As stated above, once a plaintiff has demonstrated a prima facie case, the burden of production shifts to the defendant to offer a legitimate, non-discriminatory reason for its decision not to promote the plaintiff. The burden on the defendant is one of production, not of persuasion. *St. Mary's Honor Center v. Hicks*, —— U.S. ——, 113 S.Ct. 2742 (1993). When and if the defendants proffer a legitimate, non-discriminatory reason for their actions, the burden of production then shifts back to the plaintiff to demonstrate that the defendants' proffered reason is pretextual. *Carter v. City of Miami*, 870 F.2d 578, 584 (11th Cir. 1989). "[A] reason cannot be proved to be a 'pretext for discrimination' unless it is shown both that the reason was false and that discrimination was the real reason." [emphasis in original], *Hicks*, 113 S.Ct. at 2747. The plaintiff's burden goes beyond merely establishing that the reasons offered by the defendants for their decision were not worthy of belief. The plaintiff is required to affirmatively prove by a preponderance of the evidence that discrimination did in fact occur. *Id.* at ——, 113 S.Ct. at 2751.

In this case, Moody does not challenge the promotion of Methvin and Stewart on the basis of their individual qualifications. Rather, Moody contends that he was subjected to age discrimination by a promotion system which by its very nature takes age into account. The nature of this allegation necessarily limits the type of response that is due from the defendants. Thus, the defendants' explanations are directed to its promotion system and the court finds that the following is an accurate summary of the defendant's response:

1. The Division of Disability Determination was directed by the State Personnel Department in 1990 to utilize the new Performance Evaluation System in grading the performance of their employees. Every State Department was required to do so. The system was developed over several years and all supervisors, including Moody, were trained

in its use. The system does not penalize anyone on the basis of their age, sex, race, or ethnicity.

2. The slight dip in Moody's performance evaluation scores during 1990 and 1992 were caused by his own shortcomings on the job and not because the evaluation system was more subjective than the previous system.

3. The Disability Determination Division asked the Personnel Department to change the weight of an applicant's experience and training score from 80% of his or her overall grade to 60% following a study conducted by an independent management review team. The management review team made its recommendation based on its concern that the Division's overwhelming emphasis on seniority would stifle the advancement of otherwise qualified minority workers. Rodney Taylor, then Acting Director for the Division of Disability Determination, requested the change based on this recommendation. Taylor kept the training and experience component at 60% to maintain an emphasis on seniority. Moreover, the plaintiff's overall grade for his 1992 application was not harmed by this percentage change because all of the persons included on the register had the same training and experience score.

4. The Personnel Department's policy is to "top out" an applicant's training and experience score after a certain number of years in the same position. The policy was created in recognition of the fact that at some point, every additional year in the same position does not produce an equivalent increase in productivity.

In response to the defendants' asserted non-discriminatory reasons for its promotion policies, Moody argues that the reasons are a mere pretext for age discrimination. However, he offers no real evidence to support that theory other than his subjective belief that the stated promotion policies have an unfavorable impact on older employees. Such bare allegations fall far short of proving that the defendants' stated reasons were unworthy of credence or that discriminatory reasons more likely motivated their

decisions. Accordingly, the Department of Education and its Superintendent are entitled to summary judgment as to this count.

II. The Substantive Due Process Claim

Moody also rests his claim of age discrimination on the substantive protection of the Due Process Clause as enforced by 42 U.S.C. Section 1983. The due process clause of the Fourteenth Amendment provides two distinct types of constitutional protection: substantive due process and procedural due process. *Zinermon v. Burch*, 494 U.S. 113 (1990). However, the protections afforded by the substantive component of the due process clause are generally not available in the context of public employment. In *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), the Court of Appeals for the Eleventh Circuit held that "areas in which substantive rights are created only by state law (as is the case with tort law and employment law) are not subject to substantive due process protection under the Due Process Clause because 'substantive due process rights are created only by the Constitution.' " *McKinney*, 20 F.3d at 1556 (citing *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 229 (1985)). The court further held that substantive due process rights differ from procedural due process rights in the manner in which a violation of those rights occur.

> A violation of a substantive due process right, for instance, is complete when it occurs; hence, the availability *vel non* of an adequate post-deprivation state remedy is irrelevant. Because the right is "fundamental," no amount of process can justify its infringement. By contrast, a procedural due process violation is not complete "unless and until the State fails to provide due process." In other words, the state may cure a procedural deprivation by providing a later procedural remedy; only when the state refuses to provide a process sufficient to remedy the

> procedural deprivation does a constitutional violation actionable under section 1983 arise.

Id. at 1557.

Assuming that Moody had a property right arising from his application for promotion (to which he has made no claim), that right would be protected solely by the procedural component of the Due Process Clause and not the substantive component. Having made no claim that the state has refused to provide a proper procedural remedy, Moody has no tenable Due Process claim at all.

III. The Equal Protection Claim.

Moody's final claim of age discrimination is brought pursuant to the Equal Protection Clause of the Fourteenth Amendment. Specifically, he contends that there is no rational basis for the defendants' decisions regarding their promotion policies. Here again, the defendants are entitled to summary judgment.

In cases where a classification burdens neither a suspect group nor a fundamental interest, "courts are quite reluctant to overturn governmental action on the ground that it denies equal protection of the laws." *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976). In fact, the Supreme Court has declared that an age-related classification will not be overturned unless "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [it] can only conclude that the government's actions were irrational." *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

In this case, Moody has offered no evidence that would suggest that the defendant's employment policies or decisions amounted to an age based classification for purposes of the Equal Protection Clause. Nor does the court find anything in its review of the materials submitted by the parties that would indicate that the two departments in-

tended by their policies to subject different groups to the kind of "varying treatment" addressed by the *Bradley* Court. Therefore, this court finds that the plaintiffs claim is not cognizable under the Equal Protection Clause.

Conclusion

In sum, the defendants' respective motions for summary judgment are due to be granted. A judgment in accordance with this memorandum opinion shall be entered separately.

DONE this 13th day of March, 1995.

/s/ Ira DeMent
United States District Judge

[Filed Mar. 13, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action 93-D-529-N

EDWARD DONALD MOODY,

Plaintiff,

vs.

THE DEPARTMENT OF EDUCATION OF THE STATE OF ALABAMA; DR. WAYNE TEAGUE, in his official capacity as State Superintendent of Education; THE PERSONNEL DEPARTMENT OF THE STATE OF ALABAMA; and DR. HALCYON V. BALLARD, in her official capacity as Director of State Personnel,

Defendant(s).

JUDGMENT

In accordance with the attached memorandum opinion and Rule 58 of the Federal Rules of Civil Procedure, it is CONSIDERED, ORDERED and ADJUDGED that summary judgment be and the same is hereby GRANTED in favor of the defendants The Department of Education of the State of Alabama, Dr. Wayne Teague, The Personnel Department of the State of Alabama, and Dr. Halcyon V. Ballard; and against the plaintiff, Edward Donald Moody.

It is further CONSIDERED and ORDERED that all costs herein incurred be and the same are hereby taxed against the plaintiff, for which let execution issue.

DONE this 13th day of March, 1995.

/s/ Ira DeMent
United States District Judge

APPENDIX C

[Filed Apr. 17, 1996]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-6395

EDWARD DONALD MOODY,
Plaintiff-Appellant,

versus

THE DEPARTMENT OF EDUCATION OF STATE OF ALABAMA; PERSONNEL DEPARTMENT OF THE STATE OF ALABAMA; HALYCON V. BALLARD, DR., in her official capacity as Director of State Personnell; WAYNE TEAGUE, DR., in his official capacity as State Superintendent of Education,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Alabama

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: ANDERSON, BIRCH and BLACK, Circuit Judges

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Susan H. Black
United States Circuit Judge

APPENDIX D

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment XIV: Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

29 U.S.C. § 621. *Congressional statement of findings and purpose.*

(a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among olders workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

(b) It is therefore the purpose of this Act to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

29 U.S.C. § 622. *Education and research program; recommendation to Congress.*

(a) The Secretary of Labor shall undertake studies and provide information to labor unions, management, and the general public concerning the needs and abilities of older workers, and their potentials for continued employment and contribution to the economy. In order to achieve the purposes of this Act, the Secretary of Labor shall carry on a continuing program of education and information, under which he may, among other measures.

(1) undertake research, and promote research, with a view to reducing barriers to the employment of older persons, and the promotion of measures for utilizing their skills;

(2) publish and otherwise make available to employers, professional societies, the various media of communication, and other interested persons the findings of studies and other materials for the promotion of employment;

(3) foster through the public employment service system and through cooperative effort the development of facilities of public and private agencies for expanding the opportunities and potentials of older persons;

(4) sponsor and assist State and community informational and educational programs.

(b) Not later than six months after the effective date of this Act, the Secretary shall recommend to the Congress any measures he may deem desirable to change the lower or upper age limits set forth in section 12 USCS § 631.

29 U.S.C. § 623. *Prohibition of age discrimination.*

(a) Employer practices. It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act.

(b) Employment agency practices. It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices. It shall be unlawful for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation. It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc. It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; seniority system; employee benefit plans; discharge or discipline for good cause. It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonable necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an em-

ployee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section—

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this Act, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 12(a) [29 USCS § 631(a)] because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan—

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older workers is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29 Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this Act.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) [29 USCS § 631(a)], because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (b), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this Act; or

(3) to discharge or otherwise discipline an individual for good cause.

(g) [Deleted]

(h) Foreign practices. (1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the—

(A) interrelation management

(B) common management

(C) centralized control of labor relations, and

(4) common ownership or financial control, of the employer and the corporation.

(i) Employee pension benefit plans; cessation or reduction of benefit accrual or of allocation to employee account; distribution of benefits after attainment of normal retirement age; compliance; highly compensated employees. (1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which requires or permits—

(A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of an employee's benefit accrual, because of age, or

(B) in the case of a defined contribution plan, the cessation of allocations to an employee's account, or

the reduction of the rate at which amounts are allocated to an employee's account, because of age.

(2) Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years or participation which are taken into account for purposes of determining benefit accrual under the plan.

(3) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan—

(A) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

(B) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section 206(a)(3) of the Employee Retirement Income Security Act of 1974 [29 USCS § 1056(a)(3)] and section 401(a)(13)(C) of the Internal Revenue Code of 1986 [26 USCS § 401(a)(14)(C)], and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 203(a)(3)(B) of the Employee Retirement Income Security Act of 1974 [29 USCS § 1053(a)(3)(B) or section 411(a)(3)(B)], then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the

distribution of benefits after the attainment of normal retirement age.

The provisions of this paragraph shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations shall provide for the application of the preceding provisions of this paragraph to all employee pension benefit plans subject to this subsection and may provide for the application of such provisions, in the case of any such employee, with respect to any period of time within a plan year.

(4) Compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan.

(5) Paragraph (1) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414(q) of the Internal Revenue Code of 1986 [26 USCS § 414(q)] to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in favor of highly compensated employee within the meaning of subchapter D of Chapter 1 of the Internal Revenue Code of 1986 [26 USCS §§ 401 et seq.]

(6) A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the subsidized portion of any early retirement benefits is disregarded in determining benefit accruals.

(7) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411(b)(1)(H) of the Internal Revenue Code of 1986 [26 USCS § 41(b)(1)(H)(v)] and subparagraph (C) and (D) of section 411(b)(2) of such Code [26 USCS § 411(b)(2)(C), (D)] shall apply with respect to the requirements of this subsection in the same manner and to the same extent as such regulations apply with respect to the re-

quirements of such subsection 411(b)(1)(H) and 411(b)(2).

(8) A plan shall not be treated as failing to meet the requirements of this section solely because such plan provides a normal retirement age described in section 3(24)(B) of the Employee Retirement Income Security Act of 1974 [29 USCS § 1002(24)(B)] and section 41(a)(8)(B) of the Internal Revenue Code of 1986 [26 USCS § 411(a)(8)(B)].

(9) For purposes of this subsection—

(A) The terms "employee pension benefit plan", "defined benefit plan", "defined contribution plan", and "normal retirement age" have the meanings provided such terms in section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002).

(B) The term "compensation" has the meaning provided by section 414(s) of the Internal Revenue Code of 1986 [29 USCS § 414(s)].

[j](i) Repealed

(k) Compliance of seniority system or employee benefit plan regardless of adoption date. A seniority system or employee benefit plan shall comply with this Act regardless of the date of adoption of such system or plan.

(l) Minimum age for retirement benefits not a violation; other lawful benefit provisions. Notwithstanding clause (i) or (ii) of subsection (f)(2)(B)—

(1) It shall not be a violation of subsection (a), (b), (c), or (e) solely because—

(A) an employee pension benefit plan (as defined in section 3(2) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(2) provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits; or

(B) a defined benefit plan (as defined in section 3(35) of such Act [29 USCS § 1002(35)] provides for—

(i) payments that constitute the subsidized portion of an early retirement benefit; or

(ii) social security supplements for plan participants that commence before the age and terminate at the age (specified by the plan) when participants are eligible to receive reduced or unreduced old-age insurance benefits under title II of the Social Security Act (42 U.S.C. 401 et seq.), and that do not exceed such old-age insurance benefits.

(2) (A) It shall not be a violation of subsection (a), (b), (c), or (e) solely because following a contingent event unrelated to age—

(i) the value of any retiree health benefits received by an individual eligible for an immediate pension;

(ii) the value of any additional pension benefits that are made available solely as a result of the contingent event unrelated to age and following which the individual is eligible for not less than an immediate and unreduced pension; or

(iii) the values described in both clauses (i) and (ii);

are deducted from severance pay made available as a result of the contingent event unrelated to age.

(B) For an individual who receives immediate pension benefits that are actuarially reduced under subparagraph (A)(i), the amount of the deduction available pursuant to subparagraph (A)(i) shall be reduced by the same percentage as the reduction in the pension benefits.

(C) For purposes of this paragraph, severance pay shall include that portion of supplemental unemployment compensation benefits (as described in section 501

(c)(17) of the Internal Revenue Code of 1986 [26 USCS § 501(c)(17)] that—

(i) constitutes additional benefits of up to 52 weeks;

(ii) has the primary purpose and effect of continuing benefits until an individual becomes eligible for an immediate and unreduced pension; and

(iii) is discontinued once the individual become eligible for an immediate and unreduced pension.

(D) For purposes of this paragraph and solely in order to make the deduction authorized under this paragraph, the term "retiree health benefits" means benefits provided pursuant to a group health plan covering retirees, for which (determined as of the contingent event unrelated to age)—

(i) the package of benefits provided by the employer for the retirees who are below age 65 is at least comparable to benefits provided under title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.);

(ii) the package of benefits provided by the employer for the retirees who are 65 and above is at least comparable to that offered under a plan that provided a benefit package with one-forth the value of benefits provided under title XVIII of such Act; or

(iii) the package of benefits provided by the employer is as described in clauses (i) and (ii).

(E) (i) If the obligation of the employer to provide retiree health benefits is of limited duration, the value for each individual shall be calculated at a rate of $3,000 per year for benefit years before age 65, and $750 per year for benefit years beginning at age 65 and above.

(ii) If the obligation of the employer to provide retiree health benefits is of unlimited duration, the value for each individual shall be calculated at a rate of $48,000 for individuals below the age of 65, and $24,000 for individuals age 65 and above.

(iii) The values described in clauses (i) and (ii) shall be calculated based on the age of the individual as of the date of the contingent event unrelated to age. The values are effective on the date of enactment of this subsection [enacted Oct. 16, 1990], and shall be adjusted on an annual basis, with respect to a contingent event that occurs subsequent to the first year after the date of enactment of this subsection [enacted Oct. 16, 1990], based on the medical component of the Consumer Price Index for all-urban consumers published by the Department of Labor.

(iv) If an individual is required to pay a premium for retiree health benefits, the value calculated pursuant to this subparagraph shall be reduced by whatever percentage of the overall premium the individual is required to pay.

(F) If an employer that has implemented a deduction pursuant to subparagraph (A) fails to fulfill the obligation described in subparagraph (E), any aggrieved individual may bring an action for specific performance of the obligation described in subparagraph (E). The relief shall be in addition to any other remedies provided under Federal or State law.

(3) It shall not be a violation of subsection (a), (b), (c), or (e) solely because an employer provides a bona fide employee benefit plan or plans under which long-term disability benefits received by an individual are reduced by any pension benefits (other than those attributable to employee contributions)—

(A) paid to the individual that the individual voluntarily elects to receive; or

(B) for which an individual who has attained the later of age 62 or normal retirement age is eligible.

29 U.S.C. § 624. *Study by Secretary of Labor; reports to President and Congress; scope of study; implementation of study; transmittal date of reports*

(a)(1) The Secretary of Labor is directed to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement, and report his findings and any appropriate legislative recommendations to the President and the Congress. Such study shall include—

(A) an examination of the effect of the amendment made by section 9(a) of the Age Discrimination in Employment Act Amendments of 1978 [amending 29 USCS § 631] in raising the upper age limitation established by section 12(a) of this Act [29 USCS § 631(a)] to 70 years of age;

(B) a determination of the feasibility of eliminating such limitation;

(C) a determination of the feasibility of raising such limitation above 70 years of age; and

(D) an examination of the effect of the exemption contained in section 12(c) [29 USCS § 631(c)], relating to certain executive employees, land the exemption contained in section 12(d) [29 USCS § 631(d)], relating to tenured teaching personnel.

(2) The Secretary may undertake the study required by paragraph (1) of this subsection directly or by contract or other arrangement.

(b) The report required by subsection (a) of this section shall be transmitted to the President and to the congress as an interim report not later than January 1, 1981, and in final form not later than January 1, 1982.

29 U.S.C. § 625. *Administration.*

The Secretary shall have power—

(a) to make delegations, to appoint such agents and employees, and to pay for technical assistance on a fee for service basis, as he deems necessary assist him in the performance of his functions under this Act; to cooperate with regional, State, local, and other agencies, and to cooperate with and furnish technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of this Act.

(b) to cooperate with regional, State, local, and other agencies, and to cooperate with and furnish technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of this Act.

29 U.S.C. § 626. *Recordkeeping, investigation, and enforcement.*

(a) Attendance of witnesses; investigation, inspections, records, and homework regulations. The Secretary shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this Act in accordance with the powers and procedures provided in sections 9 and 11 of the Fair Labor Standards Act of 1938, as amended (29 USC 209 and 211) [29 USCS § 209, 211].

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensations; liquidated damages; judicial relief; conciliation, conference, and persuasion. The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended (29 USC 211(b), 216, 217) [29 USCS § 211(b), 216,

217], and subsection (c) of this section. Any act prohibited under section 4 of this Act [29 USCS § 623] shall be deemed to be a prohibited act under section 15 of the Fair Labor Standards Act of 1938, as amended (28 USC 216, 217) [29 USCS sec 216, 217]: Provided, That liquidated damages shall be payable only in cases of willful violations of this Act. In any action brought to enforce this Act the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this Act through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Secretary; jury trial. (1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this Act.

(d) Filing charge with Secretary; timeliness; conciliation, conference, and persuasion. No civil action may be commenced by an individual under this section 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a charge shall be filed—

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 14(b) [29 USCS § 633(b)] applies, within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Secretary shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(e) Statute of limitations; reliance in future on administrative rulings, etc.; tolling. Section 10 of the Portal-to-Portal Act of 1947 [29 USCS § 259] shall apply to actions under this Act. If a charge filed with the Commission under this Act is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 11(a) [29 USCS § 630(a)] against the respondent named in the charge within 90 days after the date of the receipt of such notice.

(f)(1) An individual may not waive any right or claim under this Act unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum—

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this Act;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual eligible to participate, as to—

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the (Equal Employment Opportunity Commission, or a action filed in court by the individual or the individual's representative alleging age discrimination of a kind prohibited under section 4 or 15 [29 USCS § 623 or 633a] may not

be considered knowing and voluntary unless at a minimum—

(A) subparagraphs (A) through (E) of paragraphs (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this Act. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

29 U.S.C. § 627. *Notices to be posted*

Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Secretary setting forth information as the Secretary deems appropriate to effectuate the purposes of this Act [29 USCS —— 621 et seq.].

29 U.S.C. § 628. *Rules and regulations; exemptions*

In accordance with the provisions of subchapter II of chapter 5 of title 5, United States Code [5 USCS —— 551 et seq.], the Secretary of Labor may issue such rules and regulations as he may consider necessary or appropriate for carrying out this Act [29 USCS —— 621 et

seq.], and may establish such reasonable exemptions to and from any or all provisions of this Act as he may find necessary and proper in the public interest.

29 U.S.C. sec 629. *Criminal penalties*

Whoever shall forcibly resist, oppose, impede, intimidate or interfere with a duly authorized representative of the Secretary while he is engaged in the performance of duties under this Act [29 USCS —— 621 et seq.] shall be punished by a fine of not more than $500 or imprisonment for not more than one year, or both: Provided, however, That no person shall be imprisoned under this section except when there has been a prior conviction hereunder.

29 U.S.C. sec. 630. *Definitions*

For the purposes of this Act [29 USCS —— 621 et seq.]—

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized group of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year; Provided, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to

procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organiaztion, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer, or (2) the number of its members (or where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is fifty or more prior to July 1, 1968, or twenty-five or more on or after July 1, 1968, and such labor organization.

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended; or

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to

represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subsordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in

which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

(j) The term "firefighter" means an employee, the duties of whose position are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

(k) The term "law enforcement officer" means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of a State, including an employee engaged in this activity who is transferred to a supervisory or administrative position. For the purposes of this subsection, "detention" includes the duties of employees assigned to guard individuals incarcerated in any penal institution.

(l) The term "compensation, terms, conditions, or privileges of employment" encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan.

29 U.S.C. sec. 631. *Age limits*

(a) Individuals at least 40 years of age. The prohibitions in this Act shall be limited to individuals who are at least 40 years of age.

(b) Employees or applicants for employment in Federal Government. In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 15 of this Act [29 USCS — 633a], the prohibitions established in section 15 of this Act [29 USCS — 633a] shall be limited to individuals who are at least 40 years of age.

(c) Bona fide executives or high policy makers.

(1) Nothing in this Act shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing savings, or deferred compensation plan, or any combination of such plans, of the employer of such an employee, which equals, in the aggregate, at least $44,000.

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the Secretary, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover or contributions are made.

(d) Repealed

29 U.S.C. sec. 632. *Annual report to Congress*

The Secretary shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the

matters covered by this Act as he may find advisable. Such report shall contain an evaluation and appraisal by the Secretary of the effect of the minimum and maximum ages established by this Act, together with his recommendations to the Congress. In making such evaluation and appraisal, the Secretary shall take into consideration any changes which may have occurred in the general age level of the population, the effect of the Act upon workers not covered by its provisions, and such other factors as he may deem pertinent.

29 U.S.C. § 633. *Federal-State relationship*

(a) Federal action superseding State action. Nothing in this Act shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this Act such action shall supersede any State action.

(b) Limitation of Federal action upon commencement of State proceedings. In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 7 of this Act [29 USCS — 626] before the expiration of sixty days after proceedings have been commenced under State law, unless such proceedings have been earlier terminated: Provided, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

29 U.S.C. § 633a. *Nondiscriminaion on account of age in Federal Government employment*

(a) Federal agencies affected. All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with r.gard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code in executive agencies as defined in section 105 of title 5, United States Code [5 USCS — 105] (including employees and applicants for employment who are paid from nonappropriated funds), in the Uinted States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age.

(b) Enforcement by Civil Service Commission and by Librarian of Congress; remedies; rules, regulations, orders, and instructions of Commission: compliance by Federal agencies; powers and duties of Commissions; notification of final action on complaint of discrimination; exemptions; bona fide occupational qualification. Except as otherwise provided in this subsection, the Civil Service Commission is authorized to enforce the provisions of subsections (a) through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Civil Service Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall—

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress re-

ports from each department, agency, or unit referred to in subsection (a);

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age. The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Civil Service Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

(c) Civil actions; jurisdiction; relief. Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act.

(d) Notice of Commission; time of notice; Commission notification of prospective defendants; Commission elimination of unlawful practices. When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice practice occurred. Upon receiving a notice of intent to sue, the

Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

(e) Duty of Government agency or official. Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

(f) Applicability of statutory provision to personnel action of Federal departments, etc. Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this Act, other than the provisions of this section.

(g) Study and report to President and Congress by Civil Service Commission; scope. (1) The Civil Service Commission shall undertake a study relating to the effects of the amendments made to this section by the Age Discrimination in Employment Act Amendments of 1978 [see the 1978 Amendment note to this section], and the effects of section 12(b) of this Act, as added by the Age Discrimination in Employment Act Amendments of 1978 [29 USCS § 631(b)].

(2)The Civil Service Commission shall transmit a report to the President and to the Congress containing the finding of the Commission resulting from the study of the Commission under paragraph (1) of this subsection. Such report shall be transmitted no later than January 1, 1980.

29 U.S.C. § 634. *Authorization of appropriations*

There are hereby authorized to be appropriated such sums as may be necessary to carry out this Act 29 [USCS § 621 et seq.] *Code of Alabama, 1975* § 36-26-17

Vacancies in the classified service shall be filled either by transfer, promotion, appointment, reappointment or demotion.

Whenever a vacancy is to be filled by appointment, the appointing authority shall submit to the director a statement of the title of the position and, if requested by the director to do so, the duties of the position and desirable qualifications of the person to be appointed and a request that the director certify to them the names of person eligible for appointment to the position. The director shall thereupon certify to the appointing authority the name of the 10 ranking eligibles from the most appropriate register and, if more than one vacancy is to be billed, the name of one additional eligible for each additional vacancy or all the names on the register if there are fewer than 10. Except that in the appointment of attorneys or legal research aides under this section by the attorney general for appointment in the office of the attorney general the director shall certify to the attorney general the names of all eligibles who meet the minimum qualifications for the particular class of attorneys. The attorney general may then appoint any person on the register of eligibles without regard to position on that register. If it should prove impossible to locate any of the persons so certified or should it become known to the director that any person is not willing to accept the position, the appointing authority may request that additional have been certified until 10 persons eligible and available for appointment have been certified. Within 10 days after such names are certified, the appointing authority shall appoint one of those whose names are certified to each vacancy which he is to fill; except, that, in the event that he has fewer than the authorized number of persons from which to make his selection, he may

choose from the remaining certified names or if he has fewer than three persons from which to make his selection he may make a provisional appointment as provided by section 36-26-18. In the event that there does not exist an employment register which the director deems to be appropriate for the class in which the position is established, he shall prepare such a register within reasonable time after receipt of the request of the appointing authority that eligibles be certified. Whenever an eligible has been certified to and rejected by appointing authorities three times, the director may remove the name of such person from the employment register.

Supreme Court, U.S.
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(2)

No. 96-87

In The

Supreme Court of the United States

October Term, 1995

EDWARD DONALD MOODY,

Petitioner,

v.

DEPARTMENT OF EDUCATION OF THE STATE OF ALABAMA; DR. WAYNE TEAGUE, in his official capacity as State Superintendent of Education; THE PERSONNEL DEPARTMENT OF THE STATE OF ALABAMA; and DR. HALYCON V. BALLARD, in her official capacity as Director of State Personnel,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a promotion decision, based irrefutably upon a supervisor's considered judgment that the persons selected for promotion were best qualified, constitutes a pretext for age discrimination.

2. Whether a person has a substantive due process right to a particular ranking on a register of persons eligible for promotion, when state law provides for the appointment of any person on the register regardless of position on the register.

3. Whether a promotion decision-making process which is based upon a supervisor's considered judgment that the persons selected for promotion were best qualified subjects older employers to "varying treatment" in violation of the Equal Protection Clause.

PARTIES, PARENT COMPANIES AND SUBSIDIARIES

In compliance with Supreme Court Rule 14(b), Respondents represent to this Honorable Court that the parties to this Petition are all named in the caption of this case. To the knowledge of the Respondents, there are no parent companies or non-wholly owned subsidiaries with an interest in the case.

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BRIEF OF RESPONDENT IN OPPOSITION

Respondents Department of Education of the State of Alabama and Dr. Wayne Teague, in his official capacity as State Superintendent of Education (hereinafter Education Respondents), urge this Court to deny the Petition for Writ of Certiorari seeking review of the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The decisions of the United States Court of Appeals for the Eleventh Circuit being reviewed appear as an appendix to the Petition for Writ of Certiorari. The decision of the United States District Court granting summary judgment in favor of all defendants also appears in the appendix to the Petition.

STATEMENT OF THE CASE

The Education Respondents adopt the Statement of the Case as set out by the Petitioner, with the exception of argumentative commentary appearing in the Statement of the Facts. The Education Respondents adopt the Factual Background as set out by the trial court, which can be found on pages 7a-11a of the Appendix to the Petition.

REASONS FOR DENYING THE WRIT

Review on a Writ of Certiorari "is not a matter of right, but of judicial discretion," to be granted "only for

compelling reasons." Supreme Court Rule 10. The Petitioner cites two reasons for review of the decision of the Eleventh Circuit Court of Appeals: (a) The decision has so far departed from the accepted and usual cause of judicial proceedings, or sanctioned such a departure by a lower court, as to call for this Court's power of supervision, or (b) the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court. Petitioner's Brief, Page 2. The Petitioner fails, however, to present any issues in this case which compel review by this Court. Indeed, the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the district court's grant of summary judgment, is wholly consistent with existing decisions of this Court, and is therefore not proper for review by this Court.

I. THE DISTRICT COURT WAS CORRECT IN GRANTING THE MOTION FOR SUMMARY JUDGMENT BECAUSE THE STATE DEPARTMENT OF EDUCATION MADE ITS PROMOTION DECISIONS BASED UPON LEGITIMATE, NON-DISCRIMINATORY REASONS, AND THE PETITIONER HAS FAILED TO DEMONSTRATE THESE REASONS WERE A PRETEXT FOR AGE DISCRIMINATION

The district court granted the Education Respondents' Motion for Summary Judgment on the Petitioner's Age Discrimination in Employment Act (ADEA) claim because he failed to prove the Education Respondents' stated reasons for their promotional decisions were a

pretext for age discrimination. R3-68-14-15. Summary judgment is appropriate when a party fails to make a showing sufficient to establish the existence of an element essential to that party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986). The district court found that the Petitioner met his initial burden of establishing a prima facie case of age discrimination. The burden then shifted to the State Department of Education to articulate a legitimate, non-discriminatory reason for their promotion decisions. *Walker v. Nationsbank of Fla., N.A.*, 53 F.3d 1548, 1556 (11th Cir. 1995). The defendants' burden is one of production, not of persuasion. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). Once the defendants have met their burden of production, the presumption raised by the prima facie case is rebutted, and the plaintiff must then persuade the trier of fact that the employer's proffered reason was not the true reason, and the plaintiff was a victim of intentional discrimination. *Hicks*, 509 U.S. 502, 113 S.Ct. at 2748-49 (1993).

The district court set out the factors of the Education Respondents' promotion system that the Petitioner felt discriminated against him on the basis of age:

1. That the new performance evaluation system put in place by the State Personnel Department in 1990 was less objective than the previous system, and that this lack of objectivity caused him to receive lower evaluation scores in some instances.

2. That the Disability Determination Division decided pursuant to an independent management review team recommendation to change the weight of an applicant's experience and training score from 80% of his or her overall grade to 60%.

3. That an applicant's experience and training score can "top out" after a certain number of years in the same position. R3-68-6.

In response to the allegations, the Education Respondents articulated three business reasons for their promotion decisions: (1) the two persons chosen for promotion were the persons deemed most qualified for the positions, (2) the changes with regard to the evaluations were made pursuant to, and in compliance with, State Personnel Board procedures, and (3) the changes to the percentage given training/experience were made pursuant to recommendations of an independent management review team.

The Petitioner does not dispute any of the reasons proffered by the Education Respondents for their promotion decisions, or show that they were untrue and constituted a pretext for age discrimination. Rather, when questioned regarding any facts to demonstrate that the promotion decisions were made in order to discriminate against him on the basis of age, the Petitioner acknowledged he had no facts to support his claim, but stated that is simply what he believes. R1-9-Moody Depo. 23-24; 68-69. These beliefs, absent concrete evidence, do not support his allegations that the decisions were motivated for discriminatory reasons. No evidence was offered by the Petitioner to prove pretext nor is there any evidence showing the Education Respondents' actions were motivated by age.

This Court has set out the inquiry a court must make in age discrimination cases:

> In a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision. . . . Whatever the employer's decision making process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome.
>
> * * *
>
> Thus the ADEA commands that "employers are to evaluate [older] employees . . . on their merits and not their age." *Western Air Lines, Inc. v. Criswell*, 472 U. S. 400, 422 (1985). The employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly.

Hazen Paper Co. v. Biggins, 507 U.S. 604, 113 S. Ct. 1701, 1706 (1993) (citations omitted).

All persons on the Certificate of Eligibles were considered for promotion. R1-9-Taylor Depo. Ex. 7-2. Mr. Methvin and Mr. Stewart were selected because they met the qualifications for the particular positions. This analysis exemplifies the process for making legitimate, non-discriminatory employment decisions. *Hazen, supra.*

II. THE PETITIONER DOES NOT POSSESS A CONSTITUTIONALLY PROTECTED RIGHT TO A PARTICULAR RANKING ON A CERTIFICATION OF PERSONS ELIGIBLE FOR PROMOTION

The trial court, following the Eleventh Circuit's decision in *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), determined that the Petitioner has not articulated a substantive due process right. R3-68-16. The Petitioner insists, however, that he has a substantive due process right to a high numerical ranking on the certification of persons eligible for promotion. Such a right does not exist in state law, and it certainly does not rise to the level of a right protected by the United States Constitution.[1]

In *McKinney*, the Eleventh Circuit explained the need to depart from its own precedent and embrace this Court's holding that state employment decisions are not covered by substantive due process:

> The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh facts that numerous mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such

---

[1] The Petitioner cites *U.S. v. Frazer*, 317 F. Supp. 1079 (M.D. Ala. 1970) as support for his argument that a particular ranking on the Certificate of Eligibles is protected by the Fourteenth Amendment's Due Process Clause. Petitioner's Brief, pp. 5, 14. The *Frazer* case addressed unequal treatment in hiring on the basis of race, and therefore it is not relevant to the Petitioner's substantive due process argument.

> error. In the absence of any claim that the public employer was motivated by a desire to curtail or penalize the exercise of employees' constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways. The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.

Id. at 1559, quoting *Bishop v. Wood*, 426 U.S. 341, 349-50, 96 S. Ct. 274, 280, 48 L. Ed. 2d 684 (1976).

The Due Process Clause protects only *substantive* rights that are "fundamental," which are those rights the Supreme Court has "deemed implicit in the concept of ordered liberty," such as most rights enumerated in the Bill of Rights and certain unenumerated rights, such as the penumbral right of privacy. *Id.* at 1556. Because employment rights are state-created rights and are not "fundamental" rights created by the Constitution, they are not protected by substantive due process. *Id.*

The Petitioner is asking this Court to second-guess the decisions made by the Education Respondents. He disregards the fact that, in spite of his protests, he was eligible for the promotion to Disability Determination Supervisor III. He was considered for the promotion, but two other persons were determined to be more qualified. The Petitioner does not agree with this decision, and he is asking this Court to review that decision pursuant to the substantive due process analysis of the Fourteenth Amendment to the U.S. Constitution. This is the kind of review expressly rejected by this Court. The Education Respondents are entitled to make personnel decisions

they deem to be the exercise of good business judgment, without fear of a disgruntled employee's fabrication of a substantive due process violation.

III. THE PROMOTION DECISIONS DID NOT SUBJECT THE PETITIONER TO VARYING TREATMENT, AND THUS DID NOT VIOLATE THE EQUAL PROTECTION CLAUSE

The district court also determined that the Petitioner had not presented a cognizable claim under the Equal Protection Clause of the Fourteenth Amendment. R3-68-16-17. The Petitioner claims this finding was in error, because "[i]f indeed, these Defendants set out to deliberately deprive older persons of established rights by depriving them of the fruits of their lengthy experience, that effort would not only be irrational, but could also qualify as being callous." Petitioner's Brief, p. 16. The Education Respondents' decisions were based upon legitimate purposes, and did not violate any Equal Protection rights to which the Petitioner may be entitled.

This Court has determined that age is not a suspect class, and therefore, any allegations of age discrimination brought under the Equal Protection Clause should be examined under this test: whether the age-related classification is rationally related to furthering a legitimate state interest. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976). This Court has held further that an age-related classification will be overturned only when " . . . the varying treatment of different groups or persons is so unrelated to the achievement of any combination of

legitimate purposes that the legislature's actions were irrational." *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

In *Murgia*, this Court found that a statute requiring the mandatory retirement of Massachusetts State Police at the age of 50 did not deny the plaintiffs equal protection under the U.S. Constitution, because the classification was rationally related to the objective of assuring physical fitness. *Murgia* at 314. In *Vance v. Bradley*, the Court determined that a statutorily required retirement for foreign service officers at age 60 did not violate the Equal Protection Clause. *Vance* at 102. In this case, the Petitioner has failed to prove the existence of an age-related classification. He can offer nothing more than his own conclusions to support his allegation that an age-related classification exists. Even if the Education Respondents' decisions did constitute age-related classifications, their decisions were based upon a desire to evaluate all persons eligible for promotion on their merits and promote the persons most qualified for the positions.

CONCLUSION

The decision of the district court, affirmed by the Court of Appeals for the Eleventh Circuit, was one based firmly on case law well established by this Court. The decision does not present any issue compelling review by this Court. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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